RECEIVED
Feb 19 2021
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates ..... Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

BRIEF OF APPELLANT

Frank R. Ellerbe, III (Bar No. 1866)
Samuel J. Wellborn (Bar No. 101979)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Email: fellerbe@robinsongray.com
swellborn@robinsongray.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in "amortizing" the utility's annual ongoing purchased water and wastewater service expenses over several years, thus depriving the utility of recovery of most of such costs, rather than permitting the utility to recover those expenses when there is no evidence to suggest that those expenses were unreasonable or imprudent?

2. Did the Commission err in calculating the utility's cost of capital by selecting a Return on Equity that is unsupported by evidence, fell well below the supported range of reasonable Returns on Equity, fails to satisfy tests established by longstanding and binding precedent, and which is confiscatory?

3. Did the Commission err in disallowing recovery of the utility's prior Commission-related legal expenses based upon an unsupported, erroneous, and *sua sponte* finding that the expenses were either duplicative or duplicitous?

4. Did the Commission err in disallowing recovery of the utility's prior Administrative Law Court-related legal expenses based upon an unsupported, erroneous, and *sua sponte* finding that the expenses could have been recovered in the underlying proceedings?

5. Did the Commission err in disallowing recovery of the utility's storm recovery expenses by using a normalization method that would not cover and does not reflect the storm costs recently experienced by the utility?

6. Did the Commission err in disallowing recovery of the utility's headquarters office rent expense and necessary upfit costs in contravention of the evidence in the record and binding precedent?

7. Did the Commission err in disallowing recovery of the utility's non-revenue water expenses, a disallowance that forces the utility to either accept the disallowance as a penalty or make imprudent investments that are uneconomic for customers?

8. Did the Commission err in unlawfully staying the utility's implementation of rates under bond while its appeal of the Commission's decision is pending, despite clear statutory language and precedent to the contrary?

STATEMENT OF THE CASE

On October 2, 2019, after having provided due notice, Blue Granite Water Company ("Blue Granite" or the "Company") filed an Application for Approval to Adjust Its Rate Schedules and Increase Rates ("Application"). The Commission scheduled seven public night hearings in Lexington, Irmo, Union, Anderson, Greenville, Columbia, and York between January 27, 2020 and March 5, 2020, cancelling one of these due to weather.[1] The Commission conducted an evidentiary hearing on the Application from February 26, 2020 through March 2, 2020. On March 19, 2020, the Company filed a letter with the Commission offering to delay the implementation of new rates until September 1, 2020 as related to the potential impact of the COVID-19 pandemic on customers, even though the Commission was required under the applicable statute to issue an order on the Company's rate Application in April 2020. On March 25, 2020, the Commission issued Order No. 2020-260, accepting the Company's commitment not to implement new rates until September 1, 2020.

On April 9, 2020, in Order No. 2020-306, the Commission ruled on the Company's Application, denying a significant portion of the rate relief sought by the Company. On April 29, 2020, Blue Granite filed a Petition for Rehearing or Reconsideration with the Commission. On May 28, 2020, the Commission voted on the Blue Granite Petition for reconsideration, largely maintaining its initial order.[2]

[1] The Company believes this to be a record number of public night hearings in a single rate case. The Commission set two for Duke Energy Progress's most recent rate proceeding, and three for Dominion's and Duke Energy Carolinas's most recent rate proceedings, even though Blue Granite has only a nominal fraction of customers as compared to Dominion and the Duke companies.

[2] The Commission did not issue its order on reconsideration until September 23, 2020.

On June 8, 2020, pursuant to S.C. Code Ann. § 58-5-240(D), the Company filed a motion for approval of a bond that would secure for customers the difference between the rates authorized by the Commission and the rates which the Company intended to implement under bond, in addition to annual interest. On July 15, 2020, the Commission approved the Company's motion for approval of the bond by a 6-0 vote. On August 7, 2020, the South Carolina Department of Consumer Affairs (the "Consumer Advocate") filed a letter seeking clarification as to whether Blue Granite was permitted to implement rates under bond effective September 1, 2020 and expressing its concern as to the impact of the rates on consumers. The Company filed a response to the Consumer Advocate's letter on August 13, 2020, and filed its executed surety bond, procured from Liberty Mutual Insurance Company, on August 17, 2020.

On August 18, 2020, the Commission issued Order No. 2020-549, directing the Clerk's office to schedule oral arguments on the issues raised by the Consumer Advocate and staying the implementation of rates under bond "until further notice." Given the emerging uncertainty surrounding the Company's ability to recover the revenues associated with its rates under bond, on August 23, 2020, the Company filed a petition for approval of an accounting order to permit it to defer, in a regulatory asset account, the difference between the rates approved by the Commission on reconsideration and the rates it had planned to implement under bond. The Commission held oral arguments on August 27, 2020, and issued a Directive on August 31, 2020 maintaining its stay of the Company's rates under bond and granting the Company's request for an accounting order. On September 1, 2020, the Company implemented the rates authorized by the Commission on reconsideration.

On September 4, 2020, the Company filed a petition for reconsideration of Commission Order No. 2020-549, the order staying the implementation of the Company's rates under bond.

On September 16, 2020, the Commission approved a motion, memorialized in a Directive, denying the Company's petition for reconsideration.

On September 23, 2020, the Commission issued its final order on reconsideration of the rate proceeding, Order No. 2020-641, and the Company filed its Notice of Appeal with this Court on September 25, 2020. On September 28, 2020, the Company filed a Petition for a Writ of Supersedeas with this Court as related to the Commission's stay of the Company's implementation of rates under bond.

STANDARD OF REVIEW

On appeal, the Court may reverse or modify the Commission's decision if substantial rights of the Company have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5). The Commission's decision-making is arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (Ct.App. 1985); *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 463–64, 832 S.E.2d 572, 575 (2019).

Further, the Commission's order must articulate the basis for its decision-making:

> An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Where material facts are in dispute, the administrative body must make specific, express findings of fact. . . . [A] recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues. We find the order in this case deficient because PSC made no findings of fact or offered any explanation of its conclusion.

Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998); *see also Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999).

SUMMARY OF ARGUMENTS

As explained below, in its final order, the Commission made a series of errors and unsupported findings that seriously impacted the Company's rates and resulting revenue. After failing to correct these errors on reconsideration, resulting in unconscionably low revenues for the Company compared to its actual expenses, the Commission unlawfully enjoined the Company from implementing rates under bond. In the Company's view, the Commission's punishment of Blue Granite in this case falls well short of complying with this Court's recent directive that the Commission "carry out [its] important responsibilities consistently, within the objective and measurable framework the law provides." *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019) (citing *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 113 (2011)). A summary of the Commission's errors is provided as follows:

I. **"Amortization" of an Ongoing Expense** – With no supporting evidence or notice to the parties, the Commission "amortized" over a five-year period ongoing purchased water and wastewater service expenses rather than permitting the Company to update rates to reflect these currently incurred amounts. This erroneous rate treatment effectively disallows the Company's recovery of approximately $2 million of its purchased service expenses with no finding of imprudence or explanation as to why the Commission deviated from the "test year" ratemaking model relied upon by the Commission and this Court for decades. This unwarranted exercise of discretion denies the Company its right to a reasonable opportunity to recover its prudently incurred costs of providing service.

II. **Imposition of Unsupported and Confiscatory Return on Equity** – The Company proposed an ROE range from 9.75% to 10.25%; the S.C. Office of Regulatory Staff ("ORS") recommended an ROE of 9.45%; and the Consumer Advocate recommended an ROE of

8.65%. The Commission selected an ROE of 7.46%, which is, again, unsupported by evidence, and the Commission offered no substantive explanation or rationale for how it arrived at its determination. The Commission's ROE determination must fall within a range of reasonable ROEs that are supported by the evidence in the record, not below the range. Further, the Commission's punitive ROE fails the end results test set forth in binding precedent and is far below any other recent or contemporaneous ROE finding in the nation, underscoring both the arbitrary and capricious nature, and the confiscatory result, of the Commission's unsupported decision.

III. **Baseless Disallowance of Legal Expenses from Commission Proceedings** – The Commission's disallowance of legal expenses from two prior Commission proceedings as being purportedly duplicative has no evidentiary support in the record, was not proposed by any party, and is yet another example of unsupported and punitive decision-making. Further, because the Commission's *sua sponte* finding that the expenses were duplicative was the Commission's own novel invention in the final order, the Company was denied any opportunity to proffer evidence as to this issue.

IV. **Baseless Disallowance of Legal Expenses from Administrative Law Court Proceedings** – The Commission disallowed, with no support whatsoever, legal expenses incurred as a result of certain Administrative Law Court ("ALC") proceedings. This issue received no discussion in the Commission's final order, and there is no evidence in the record supporting the Commission's determination. Again, because the erroneous explanation provided in the directive (no explanation was provided in the final order) that the Company should have sought reimbursement within the condemnation case was the Commission's novel creation and was not at issue during the proceeding, the Company was given no opportunity to proffer evidence as to this issue.

V. **Erroneous Storm Recovery Cost Expense Level** – The Commission's disallowance of the Company's storm costs and its imposition of ORS's proposed 10-year storm cost normalization is yet another example of erroneous Commission decision-making intended to punish the Company. The evidence in the record demonstrates that the storm cost level established by the Commission would not cover and does not reflect the storm costs recently experienced by the Company. Further, the Commission's rationale for this adjustment was simply that "there is disagreement among the parties," providing no basis for its decision-making. The Commission, as it did frequently in this case, chose the storm cost level simply because it was the "lowest offer on the table," not because it is the result of reasoned decision-making.

VI. **Erroneous Disallowance of Headquarters Office Rent Expense and Upfit Costs** – The Commission completely disallowed the Company's recovery of its headquarters office rent expense, as well as the associated upfit costs required to make the office "ready to work." The disallowance ignores both the substantial evidence in the record and the presumption that a utility's expenses are made in good faith and are reasonable. The disallowance also erroneously disregards the evidence in the record regarding the Company's reasonable decision as to where to locate its office and usurps the utility's business management decision-making authority.

VII. **Erroneous Disallowance of Non-Revenue Water Expenses** – The Commission's decision to disallow Blue Granite's recovery of non-revenue water expenses of greater than 10% is characterized by an abuse of discretion or a clearly unwarranted exercise of discretion, and no evidence was proffered that overcame the presumption of the reasonableness of the Company's water expenses. The evidence demonstrates that the Commission's disallowance forces the Company to either accept the disallowance as a penalty or make

imprudent investments that are uneconomic for customers, a dilemma that is the product of unreasoned decision-making.

VIII. **Unlawful Stay of Rates Under Bond** – The Commission's stay of the Company's implementation of rates under bond was the final flourish on its series of erroneous and unlawful acts in this case. The Commission has, for more than a decade, found that it has no discretion as related to a utility's implementation of rates under bond apart from approving the amount of the bond and the surety. The Commission, *in this very case*, made the same pronouncement that it "has no discretion other than to approve the amount of bond and the sureties" in a unanimous motion approving the bond. Nevertheless, ignoring the governing statute and its own consistent findings that it does not have authority as related to this issue, and after initially approving the bond, the Commission punitively stayed the Company's implementation of rates under bond and unlawfully denied the Company's access to those revenues.

ARGUMENTS

I. The Commission erred in "amortizing" ongoing purchased water and wastewater service expenses rather than reflecting these ongoing costs in rates.

Blue Granite provides water and wastewater services to its customers both through its own water and wastewater facilities and also by purchasing wholesale water and wastewater services from third parties ("Purchased Service Expenses"). These Purchased Service Expenses are part of the Company's ongoing cost of providing service and are measurable like any other test year expense. As Purchased Service Expenses are ongoing, recurring expenses, they require ongoing recovery in rates at prudent cost levels. The test year ratemaking paradigm permits regulated entities to make "pro-forma adjustments" to their designated test year's expense levels to reflect ongoing, prudent costs to provide service. Blue Granite presented undisputed evidence that it had incurred Purchased Service Expenses significantly beyond its test year levels, and proposed to include a pro-forma adjustment in its revenue requirement as part of its cost of service.[3] Without explanation or evidentiary support, the Commission rejected the inclusion of these expenses in rates. Both the Company and ORS sought reconsideration of this issue, believing the Commission had made an error. As summarized in ORS's petition for rehearing, the amount at issue "reflects the accounting treatment necessary to establish the purchased water and sewer expenses *going-forward* to current expense levels experienced by the Company." ORS Petition for Rehearing at 4 (emphasis original) (R. p. 785). On reconsideration—again, inexplicably—rather than correct the error by updating the Company's rates, the Commission "amortized" over five years the

[3] This issue is linked to the non-revenue water issue discussed below in § VII. Blue Granite presented undisputed evidence that it had incurred $2,553,472 in ongoing Purchased Service Expenses above its test year level, and proposed to include this amount in its revenue requirement as part of its cost of service. ORS agreed that such an adjustment was warranted, but proposed to adjust this amount based on its proposed 10% non-revenue water threshold, resulting in a Purchased Service Expense test year pro-forma adjustment of $2,324,292. The Court's treatment of these two issues will determine the figure appropriate for ultimate inclusion in rates.

adjustment to the ongoing expenses; that is, the Commission permitted rates to reflect only one-fifth of the ongoing increase in expenses. The Commission did not offer an explanation in its order on reconsideration as to how amortizing an ongoing expense makes any sense or has any precedent in a ratemaking context.[4] More importantly, this bizarre and unexplained rate treatment results in a substantial disallowance for the Company and significant confusion on reconciling its authorized deferral mechanisms.

As previously articulated by the Commission and by this Court, the purpose of using a test year in ratemaking "is to permit sufficient and accurate cost recovery as the expenses are incurred by the utility in real-time. In other words, the purpose of this ratemaking exercise of using a test year and making appropriate adjustments is to match—as closely as possible—the utility's revenue to the costs it will incur after the rates are implemented." Order No. 2019-323, Docket No. 2018-319-E at 15-16 (May 21, 2019) (citing *Southern Bell Tel. & Tel. Co. v. S.C. Pub. Serv. Comm'n*, 270 S.C. 590, 602 (1978)); *see also Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984) ("The object of test year figures is to reflect typical conditions."). The Commission, without explanation ignored the test year paradigm for purposes of the Company's ongoing Purchased Service Expenses. Further exacerbating the incomprehensibility of the Commission's action, the Commission applied this treatment only to the pro-forma adjustment portion of the Purchased Service Expense amount, rather than to the entire amount in a consistent fashion, without any explanation or underlying logic. This has the effect of disallowing a significant portion of Blue Granite's annual, ongoing level of Purchased Service Expenses, with

[4] The Commission erroneously treated the Company's ongoing expenses for purchased water and sewer treatment the same as the Company's past, discrete amount of the same type of expenses that had been deferred in a regulatory asset account. While recovery of a deferred amount is appropriately recovered over a multi-year period, there is no logic or precedent supporting the "amortization" of an ongoing expense such as that discussed herein. The Company explained the error in its request for rehearing, but the Commission failed to correct the error.

no evidence, no finding of unreasonableness or imprudence, and—because it was the Commission's own post-hearing invention—no opportunity for the Company to present evidence as to why this novel ratemaking treatment should not be utilized. To be clear, no party to the proceeding proposed this ratemaking treatment and no party supported it on reconsideration.

Pursuant to the principles established in *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) (*Bluefield*) and *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944) (*Hope*), the Company has a constitutional right to a reasonable opportunity to recover its prudently incurred costs of providing service. The Order's treatment of Blue Granite's Purchased Service Expenses does not allow a reasonable opportunity to recover its costs of providing service and is therefore violative of Blue Granite's rights secured under the due process provisions of the South Carolina and U.S. Constitutions. Further, the Commission's effective disallowance of approximately $2 million of these ongoing expenses is not supported by the evidence in the record, is arbitrary and capricious, and was not proposed or supported by any party in this proceeding and therefore violates the Company's due process rights because the Company was not on notice as to this potential treatment and has had no opportunity to be heard or introduce evidence related to it. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

Further, although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the S.C. Supreme Court has concluded that a utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith, unless evidence is proffered that overcomes that presumption. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286, 422 S.E. 110, 112 (1992); *Utils. Servs. of S.C., Inc.*

v. S.C. Office of Regulatory Staff, 392 S.C. 96, 110, 708 S.E.2d 755, 762-63 (2011). In this case, there is absolutely no evidence or even suggestion that these expenses are unreasonable. The Commission's decision is thus arbitrary and capricious and unsupported by substantial evidence. The Company asks this Court to reverse this clearly erroneous decision and remand the issue to the Commission with direction to modify rates to reflect the full amount of the Company's ongoing Purchased Service Expenses.

II. No witness proposed the Return on Equity selected by the Commission, and it is unsupported by the record.

In addition to determining the annual operating expenses of the utility (operation and maintenance expenses, depreciation expense, tax expense, etc.), setting rates for a utility involves determining a fair rate of return that a utility should be allowed the opportunity to earn on its capital deployed to provide service to customers. The legal standards for this determination are set forth in the seminal cases of *Hope*, 320 U.S. at 602-03 and *Bluefield*, 262 U.S. at 692-93. *Bluefield* holds that:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting the opportunities for investment, the money market and business conditions generally.

Bluefield, 262 U.S. at 692-93. Rates that are not sufficient to yield a reasonable return are "unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment." *Id.* at 690.

In *Hope*, the Court emphasized that it is "the result reached and not the method employed" which is controlling in determining just and reasonable rates. *Hope,* 320 U.S. at 603. The *Hope* Court examined certain factors to be considered in arriving at just and reasonable rates. Among those considerations enumerated by the Court were the following: (1) rates should be sufficient to assure confidence in and financial security of the company's enterprise; (2) rates should be sufficient to allow the company to maintain its credit and attract capital; and (3) rates should be sufficient to provide the corporate equity holders with a reasonable return on their investment. *Id*. The *Hope* Court made clear that the fixing of just and reasonable rates unquestionably involved "a balancing of investor and consumer interests." *Id*. at 604.

The Commission and South Carolina courts have consistently applied the principles set forth in *Bluefield* and *Hope*. Quoting *Hope*, the South Carolina Supreme Court has held: "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling . . . . The ratemaking process under the Act, i.e., the fixing of 'just and reasonable' rates, involves the balancing of investor and the consumer interests." *Southern Bell*, 270 S.C. at 596 (quoting *Hope,* 320 U.S. at 602-03). The Commission must exercise its dual responsibility of permitting utilities an opportunity to earn a reasonable return on the property it has devoted to serving the public, on the one hand, and protecting customers from rates that are so excessive as to be unjust or unreasonable, on the other, by "(a) [n]ot depriving investors of the opportunity to earn reasonable returns on the funds devoted to such use as that would constitute a taking of private property without just compensation[, and] (b) [n]ot permitting rates which are excessive." *Southern Bell*, 270 S.C. at 605. Additionally, the Commission's determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record. *Porter v. S.C. Pub. Serv. Comm'n,* 332 S.C. 93, 98, 504 S.E.2d 320, 323 (1998).

There are three components to determining a fair rate of return for a utility: the utility's capital structure, the cost of debt, and the cost of equity. Blue Granite's capital structure and cost of debt are not at issue in this appeal; the Commission's findings concerning Blue Granite's cost of equity are a subject of this appeal.

Three parties presented analytical evidence to the Commission concerning Blue Granite's cost of equity. Blue Granite witness Dylan D'Ascendis, a Director at ScottMadden, Inc., testified that the Company's cost of equity ranged from **9.75% to 10.25%**. Tr. p. 548.4, l. 9; p. 548.6, ll. 10-11; p. 554, ll. 1-4 (R. p. 910, line 9; p. 9911, lines10-11; p. 917, lines. 1-4).[5] David Parcell, a principal and senior economist with Technical Associates, Inc., testified on behalf of the ORS on cost of equity. He recommended a cost of equity of **9.45%**. Tr. p. 1004.4, ll. 10-11; p. 1004.37, ll 7-8; p. 1005.12, ll. 18-19 (R. p. 1073, lines 10-11; p. 1081, lines 7-8; p. 1086, ll. 18-19).[6] Aaron

[5] Mr. D'Ascendis calculated the Company's cost of equity by applying several well-known cost of equity models – the Discounted Cash Flow Model ("DCF"), the Risk Premium Model ("RPM"), the Capital Asset Pricing Model ("CAPM") – to the market data of a proxy group of water utility companies and to a proxy group of domestic, non-price regulated with comparable risk to the utility proxy group. These analyses produced a cost of equity estimate of 9.75%. He then applied a 0.50% upward adjustment to account for Blue Granite's higher relative business risk. Tr. p. 547.5, l. 7 through p. 547.6, l. 25 (R. p. 904 line 7-p.905, line 25); updated in Rebuttal Testimony at Tr. p. 548.4, ll. 7-12 (R. p. 910, lines 7-12). Mr. D'Ascendis emphasized the importance of using multiple cost of equity models to determine a utility's cost of equity, because no single model is so inherently precise that it can be relied on solely to the exclusion of other theoretically sound models. He noted that the use of multiple models adds reliability to the estimation of the cost of equity rate, and the prudence of using multiple cost of equity models is supported in both financial literature and regulatory precedent. Tr. p. 547.37, ll. 12-17 (R. p. 909, lines 12-17). Based on the results of his analyses, the average of the mean and the median of all of the model results produces an unadjusted estimated cost of equity of 9.75%. Mr. D'Ascendis then made an upward adjustment of 0.50% to reflect Blue Granite's greater business risk due to its unique risks as well as its small size relative to the proxy group, resulting in his recommended cost of equity of 10.25% for Blue Granite. Tr. p. 547.37, ll. 18-22 (R. p. 909, lines 18-22); updated in Rebuttal Testimony at Tr. p. 548.4, ll. 6-12 (R. p. 910, lines 6-12).

[6] To estimate the Company's cost of equity, Mr. Parcell employed the following three methodologies: DCF, CAPM, and Comparable Earnings ("CE"). Based upon his use of these models, he concluded that the Company's cost of equity is within a range of 8.9% to 10.0% (9.45% being the midpoint), which is based upon the upper end of his DCF results and the upper end of his CE results. He stated that he used the upper ends of his DCF and CE ranges in order to give

Rothschild, President of Rothschild Financial Consulting, testified on cost of equity on behalf of the Consumer Advocate. He recommended a cost of equity of **8.65%**. Tr. p. 672.8, ll. 6-8; p. 672.27, ll. 5-6 (R. p. 954, lines 6-8; p. 973, lines 5-6).[7] Thus, the cost of equity supported by the evidence in this case ranges from **8.65% to 10.25%**.

In its order, the Commission concluded that a return on equity of **7.46%** is the appropriate ROE for Blue Granite. The entirety of the Commission's explanation and justification for its return on equity finding was as follows:

> While the record of evidence before it from witnesses presented by the ORS and Consumer Affairs indicates that the cost of common equity nationally is on the decline. Tr. p. 672.13. Also, the evidence in the record clearly supports the Commission's conclusion that Blue Granite witness D'Ascendis' Return on Equity ("ROE") is too high.
>
> In considering the quality of service issues known to exist with Blue Granite and the setting of just and reasonable rates, the Commission concludes that the analysis used by Consumer Affairs witness Rothschild is the most compelling, applies cost of equity models using

---

consideration to any perceived unique attributes of Blue Granite. Tr. p. 1004.3, l. 1 through p. 1004.4, l. 7 (R. p. 1072, line 1-p. 1073, line 7). Mr. Parcell made no adjustments to reflect an increased risk to Blue Granite due to its smaller size. However, he did select the high ends of his ranges of DCF and CE cost rates to reflect the "perceived unique attributes of [Blue Granite]." Tr. p. 1004.4, ll. 5-7 (R. p. 1073, lines 5-7). Based upon those "unique attributes" and because—in his view—the "DCF results are low by historic standards," Mr. Parcell selected the higher end of his range. Tr. p. 1015, ll. 16-19 (R. p. 1087, lines 16-19).

[7] In arriving at his return on equity recommendation for Blue Granite, Mr. Rothschild employed a DCF Model, a Non-Constant Growth DCM Model, and a CAPM analysis. Tr. pp. 672.4-8 (R. pp.950-954). According to Mr. Rothschild, the primary reasons for the differences between Mr. Rothschild's and Mr. D'Ascendis' estimated cost of equity for the Company stem from: (1) Mr. Rothschild's use of a proxy group that excludes Mr. D'Ascendis' non-price regulated companies, due to his belief that such companies are not sufficiently comparable; (2) Mr. Rothschild's use of a lower risk premium than Mr. D'Ascendis, based on his view that market-based return expectations are lower than the risk premium assumed by Mr. D'Ascendis. Tr. p. 672.9-13 (R. pp.955-959). In arriving at his ROE recommendation for Blue Granite, Mr. Rothschild gives equal weight to his Constant Growth DCF, Non-Constant Growth DCF, and CAPM analyses. Mr. Rothschild testified that his recommended return on equity of 8.65% is reasonable, due to the fact that stocks are expensive; interest rates are low; credit spreads are low; and volatility expectations are relatively low (based on the "VIX" Market Volatility Index). His recommended 8.65% cost of equity included a 28-basis point upward adjustment to the ROE for size and a 10-basis point downward adjustment to the ROE for financial risk. Tr. p. 672.13-15; Tr. p. 548.43, ll. 14-16 (R. pp.959-961; p.913, lines 14-16).

> water utility companies without the influence of non-utility companies, is objectively just and reasonable, and supported by ample evidence in the record. Tr. pp. 672.8-672.10. We conclude that the average ROE of 7.46% by Consumer Affairs witness Rothschild is the approved and appropriate ROE for Blue Granite based upon (a) the evidence on the whole record, (b) the three witnesses, Consumer Affairs Rothschild's approach was unique in that he included the use of both historical and forward-looking, market-based data in his analysis. rate of return methodology, and (c) a Test Year beginning July 1, 2018 and ending June 30, 2019.

Order No. 2020-306 at 37-38 (R. pp. 278-279).

There are several major flaws with the Commission's return on equity findings, compelling the conclusion that the Commission's decision was arbitrary and capricious, unsupported by substantial evidence of record, punitive, and confiscatory. First, it is arbitrary and capricious because it is not based on substantial evidence in the record. While the Commission characterizes the 7.46% ROE finding as being an "average" ROE proposed by witness Rothschild, it is not. Witness Rothschild recommended an ROE of 8.65%, not 7.46%. Second, in its order, the Commission failed to sufficiently explain the reasoning behind its ROE decision – in particular, it failed to address, even summarily, the major disagreements among the cost of equity witnesses, such as: (1) the appropriate weighting for the different ROE methodologies, particularly in the current capital environment; (2) the use of historic and current data versus projected data; (3) the importance of an ECAPM analysis in this capital and market environment; and (4) the importance of company-specific risks such as size. Third, the Commission's rationale for its ROE determination is not based on substantial evidence in the record: (1) the Commission's ROE determination must fall within a range of reasonable ROEs supported by the record evidence, not below the range; and (2) the Commission's finding that only water utilities may be proxy companies in cost of equity analyses is arbitrary and capricious, given its findings in other cases. Finally, and most importantly, the Commission's punitive 7.46% ROE fails *Hope*'s end results test. It is far below any other contemporaneous return on equity finding in the nation and 161 basis

points below the 9.07% ROE allowed by the Commission in an order issued in the Palmetto Utilities rate case on August 20, 2020,[8] underscoring both the arbitrary and capricious nature, and the confiscatory result, of the Commission's decision.

The record evidence is clear – witness Rothschild, the analysis of whom the Commission expressly adopted, repeatedly recommended an ROE of 8.65%, not 7.46%:

- "My rate of return recommendation is a weighted average cost of the following two components: a cost of equity (ROE) of **8.65 percent** and cost of debt of 5.73 percent." Tr. p. 660, l. 24 through p. 661, l. 2 (emphasis added) (R. p. 941, line 24-p. 942, line 2).
- "My market base[d] cost of equity recommendation, **8.65 percent**, is superior to a cost of equity recommendation based on historical data . . . ." Tr. p. 662, ll. 7-10 (emphasis added) (R. p. 943, lines 7-10).
- "[M]y **8.65 percent** return on equity for investing in a regulated utility company is sufficient to raise capital." Tr. p. 663, ll. 18-21 (emphasis added) (R. p. 944, lines 18-21).
- "I conclude that the cost of equity allowed for the company should be **8.65 percent** with an overall cost of capital of 7.27 percent." Tr. p. 670, ll. 20-22 (emphasis added) (R. p. 945, lines 20-22).
- "My **8.65 percent** cost of equity and an overall cost of capital rate of return of 7.27 percent should be adopted because it will allow BGWC to raise capital on

[8] Order No. 2020-561 at 43, Docket No. 2019-281-S (Aug. 20, 2020) ("The Commission finds a capital structure of 45.40% debt and 54.60% equity and a ROE of 9.07% to be just and reasonable.").

reasonable terms while fulfilling their obligation to provide safe and reliable service." Tr. p. 671, ll. 11-16 (emphasis added) (R. p. 946, lines 11-16).

A review of Mr. Rothschild's testimony and exhibits reveals that, while the low-end results of his cost of equity modeling averaged 7.46%,[9] at no point in his testimony did he recommend or find reasonable an ROE of 7.46%. Similarly, nowhere in his testimony did he opine that a 7.46% ROE would be sufficient to assure confidence in and financial security of the Company's enterprise, to allow the Company to maintain its credit and attract capital, and to provide the Company's equity investors with a reasonable return on their investment, as required by *Hope* and *Bluefield*. While the Commission concluded that its imposed ROE of 7.46% "allows Blue Granite to raise the capital it needs to provide safe and reliable service to its' [sic] customers,"—Order No. 2020-306 at 43 (R. p. 285)—this conclusion is unsupported by any evidence, and the language appears to be lifted from Mr. Rothschild's testimony, who recommended an ROE of 8.65%: "If adopted, my rate of return recommendation [of 8.65%] **would allow BGWC to raise the capital it needs to provide safe and reliable service**, because my recommendations are consistent with investors' expectations." Tr. p. 677, ll. 3-7 (emphasis added) (R. p. 1022, lines 3-7). This is yet another example of the Commission's arbitrary and unsupported decision-making in this case.

Another fundamental flaw in the Commission's order is the failure to address and explain in any manner the reasoning behind its ROE decision. The three ROE witnesses presented detailed testimony and analyses that suggested fundamental disagreements in several areas. For example, the witnesses disagreed on: (1) the appropriate weighting for the different ROE methodologies, particularly in the current capital environment; (2) the use of historic and current data versus projected data; (3) the importance of an ECAPM analysis in this capital and market environment;

[9] *See* Tr. p. 672.8, l. 10 through p. 672.9, l. 1 (R. p. 954, line 10-p. 955, line 1).

(4) the importance of company-specific risks such as size; and (5) the importance of maintaining financial integrity of the utility. As the South Carolina Supreme Court has held, the determination of a fair rate of return must be documented fully in the order's findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record. *Porter v. S.C. Pub. Serv. Comm'n*, 332 S.C. 93, 98, 504 S.E.2d 320, 323 (1998). Further, where material facts are in dispute—as they certainly were in this case with respect to ROE—the administrative body must make specific, express findings of fact. *Id*. at 99, 504 S.E.2d at 323. As in the *Porter* case, the Commission here "did not make findings of fact which explain how it arrived at a rate which was not recommended by any of the witnesses." *Id*. A lack of "explanation as to what and why certain portions of the expert testimony were adopted cannot serve as a substitute for a finding of facts." *Id*. at 99-100. The Commission's order does not even acknowledge the fundamental differences on the issues between the expert ROE witnesses, let alone address or explain them.

Finally, and most importantly, the Commission's punitive 7.46% ROE fails to meet the requirement in *Hope* that the end result be just and reasonable. The selected ROE is far below any other contemporaneous return on equity finding in South Carolina, indeed in the nation, underscoring both the arbitrary and capricious nature, and the confiscatory result, of the Commission's decision. In fact, as Company witness D'Ascendis testified, Mr. Rothschild's proposed 8.65% ROE would have been the lowest ROE authorized for a water/wastewater utility in the United States – let alone a 7.46% ROE. Tr. p. 584, ll. 7-9 (R. p. 939, lines 7-9). Moreover, a review of rate orders from state commissions since 2007 indicates that the unsupported 7.46% ROE is the lowest established in any state in well over a decade.[10] Tr. p. 548.53, ll. 1-3 (R. p. 915, lines 1-3).

[10] As with many issues in this case, had the Company been on notice that the Commission would chart its own course to a 7.46% ROE, the Company would have proffered additional

Indeed, the Commission authorized a 10.5% ROE for Blue Granite just two years ago.[11] Yet in this case, the Commission authorized an ROE of 7.46%—the lowest ROE in the United States in more than a decade and over 300 basis points below what it authorized Blue Granite just two years ago—despite the fact that in this case, the evidence demonstrated that Blue Granite was earning virtually no return on its capital employed to serve its South Carolina water and wastewater customers, even before the rate increase. Tr. p. 763.6, ll. 10-12 (R. p. 1050, lines 10-12) ("[The Company] is currently earning only 0.10% on an unadjusted basis and is actually earning ***negative 3%*** on an adjusted basis.").

The ROE findings in this case are by no means merely a hypothetical exercise. Blue Granite must compete for investors and capital against these other utilities. The punitive nature of the Commission's order in this case will impede the Company's ability to compete for and attract capital and investors, which in turn will harm its financial integrity, ultimately harming both the Company and its customers. The Court should reverse and remand the Commission's order with respect to its return on equity findings.

III. There is no evidence to support the Commission's disallowance of legal expenses from previous Commission proceedings.

The Commission erroneously and contrary to the record evidence in this case, as well as the positions of the parties to the case, concluded that the Company should be denied recovery of costs associated with two prior Commission proceedings that were subsumed into the rate case. Specifically, the Commission found that the Company should not be permitted to recover its legal

---

evidence showing that the selected ROE—which was not supported by any party or evidence—is confiscatorily low by any measure. *See Utils. Serv.*, 392 S.C. at 107, 708 S.E.2d at 761 (holding that it was an error of law for the Commission to fail to give the utility a meaningful opportunity to offer rebuttal evidence).

[11] *See IN RE Application of Carolina Water Service, n/k/a Blue Granite Water Co.*, Order No. 2018-345(A) at 140, Docket No. 2017-292-WS (May 30, 2018).

expenses associated with Docket No. 2018-358-WS, in which Blue Granite sought approval of an Annual Rate Adjustment Mechanism, and Docket No. 2018-361-S, in which Blue Granite sought changes to Interceptor Tank Charges. The Commission denied recovery of these expenses based upon a groundless finding that the expenses were duplicative of those incurred in the prior Commission proceedings. Order No. 2020-306 at 101, Docket No. 2019-290-WS (Apr. 9, 2020) (R. p. 342).[12]

The two dockets in question were pending immediately prior to the filing of the Blue Granite rate case application, the issues pending in the two dockets were addressed in this proceeding, and the work performed in the two underlying proceedings was relied and built upon in preparation of the rate case application. Blue Granite requested withdrawal without prejudice of the two petitions on July 17, 2019, which the Commission granted through Order Nos. 2019-542 and 2019-547, and the Company filed its notice of intent for the rate case proceeding on August 30, 2019. In its application and exhibits, Blue Granite sought recovery of legal expenses from the two dockets as test year expenses. ORS accepted the amount of the expenses but proposed that they be reclassified as rate case expenses, along with the separate and distinct costs related to the rate case application, and amortized over three years. Tr. p. 1115.12, ll. 3-6 (R. p. 1090, lines 3-6). The Company accepted this reclassification in its rebuttal testimony. Tr. p. 764.31, ll. 5-7 (R. p. 1061, lines 5-7).

[12] The Order actually uses the word "duplicitous" rather than "duplicative" to describe the expenses, but the Company believes that the Commission intended the latter. The Company flagged this issue in its request for rehearing, but the Commission neglected to address the lack of clarity in its order on rehearing. The Company's arguments articulated herein apply equally should the Commission have purposely used the word "duplicitous"; there is no evidence supporting a finding in either case, the disallowance is arbitrary and capricious, and the Commission's disallowance is affected by error of law.

Upon independent questioning from Commissioner Ervin, ORS witness Daniel Sullivan confirmed that the proceedings were subsumed into the rate case proceeding, and that the underlying costs were prudently incurred. Tr. p. 1146, l. 17 through p. 1147, l. 16 (R. p. 1098, line 17-p. 1099, line 16). Despite the only evidence in the record being that the expenses were prudently incurred and appropriate for recovery, the Commission inexplicably made a finding to the contrary, that the expenses were duplicative—duplicative of what, it was not made clear—and therefore not recoverable. No party to the proceeding offered evidence supporting this view, and no party supported it on rehearing.

As recited throughout this brief, the Commission's decision-making is arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (Ct.App. 1985) (*Deese*); *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 463-64, 832 S.E.2d 572, 575 (S.C. 2019) (*Daufuskie*). Disallowing prudently incurred expenses following a baseless finding that the expenses were duplicative of some other unspecified expenses violates not just one, but each of these criteria for arbitrary decision-making. Without any evidence or supporting reasoning—apart from a baseless finding that a disallowance would prevent ratepayers from being responsible for expenses that are "duplicitous in nature"—the Commission's disallowance is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards."

The Commission's finding that the legal expenses from Dockets 2018-358-WS and 2018-361-S were duplicative is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. No party proffered any testimony or evidence, and the Commission

took no evidence, supporting a conclusion that the expenses were duplicative of any other expenses. ORS was a party to the previous proceedings at issue and was in a position to know whether the expenses from the two dockets were duplicative of any other expenses. Instead of making any contention that the expenses were duplicative, ORS proposed, and the Company accepted, that the expenses be recovered as rate case expenses, along with costs specifically related to the rate case application, instead of test year legal expenses. At the hearing, upon independent questioning from a commissioner, ORS witness Mr. Sullivan confirmed that the proceedings were subsumed into the rate case proceeding, and that the underlying costs were prudently incurred. Tr. p. 1146, l. 17 through p. 1147, l. 16 (R. p. 1098, line 17-p. 1099, line 16). ORS's rate treatment, had it been accepted by the Commission, would have amortized the expense over three years instead of being recovered in base rates, resulting in savings to customers. Instead of accepting this rate treatment agreed to by the parties, the Commission unfairly penalized the Company by making the unsupported finding that the expenses are duplicative, disallowing recovery entirely. This finding lacks support in the record, is arbitrary and capricious, and constitutes clear error.

The Commission's ruling that the legal expenses associated with the prior proceedings were duplicative finds absolutely no support in the record. The ruling is thus indistinguishable from this Court's treatment of the Commission's ruling in *Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) regarding the inclusion in rate base of a water tank owned by the utility.

> We find the Commission's conclusion that the "murky" ownership of the equipment located on the Elevated Tank Site precludes DIUC from including the value of that property in its rate base is unsupported by the substantial evidence in the record. The only evidence submitted regarding ownership of the equipment came from Walls, who unequivocally stated the tax deed did not convey the utility equipment. Thus, we discern nothing in the record to suggest the ownership status of the water tank and utility property is "murky." Rather, the evidence before the Commission is quite clear—DIUC owns the utility equipment located on the Elevated Tank Site, and is therefore entitled to include the value of this property in

its rate base.

Daufuskie, 420 S.C. at 317. Like the Commission's determination that ownership of the water tank was "murky," the Commission's determination that these expenses were duplicative finds no support in the record.

The finding in the Order that these expenses were duplicative is affected by an error of law because the Commission failed to provide Blue Granite any opportunity to respond to or offer evidence on the issue of whether the legal expenses were duplicative. In *Utils. Serv. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011), the South Carolina Supreme Court held that it was error of law for the Commission to fail to give a utility "a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates." *Utilities Services*, 392 S.C. at 107. In this case, there is no evidence supporting the Commission's conclusion and, in any case, Blue Granite was provided no opportunity to address the question of whether the expenses were duplicative. Further, other Supreme Court precedent requires that utilities be granted a presumption of reasonableness, and if evidence is proffered "that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286, 422 S.E. 110, 112 (1992). In this case, no evidence was proffered to overcome the utility's presumption of reasonableness. Instead, out of the blue in the Commission's final order, the Commission somehow concluded that the expenses were duplicative. This is yet another sign that, instead of heeding this Court's warning to "carry out [its] important responsibilities consistently, within the 'objective and measurable framework' the law provides," the Commission set out to punish Blue Granite. *Daufuskie*, 427 S.C. at 464, 832 S.E.2d at 575 (citing *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 113 (2011)).

IV. The Commission's disallowance of legal expenses associated with certain ALC proceedings is unsupported by the record, arbitrary and capricious, and based on grounds of which Blue Granite had no notice and to which it had no opportunity to respond.

In its Directive issued on March 25, 2020 ("March 25th Directive," (R. p. 429)) and in Exhibit 1 of Order 2020-306 (R. p. 379), the Commission excluded recovery of deferred legal expenses relating to two proceedings in the Administrative Law Court: a DHEC Permit Denial and I-20 Interconnection Plan (jointly, the "ALC Proceedings").[13] Legal expenses from the ALC Proceedings had been duly deferred by Blue Granite pursuant to Commission Order No. 2018-182. Tr. p. 763.9, ll. 19-21 (R. p. 1051, lines 19-21). In this proceeding Blue Granite proposed the amortization of $216,773 (DHEC Permit Denial) and $65,948 (I-20 Interconnection) over five years. ORS agreed with, and no party objected to, Blue Granite's proposal. Tr. p. 1128.6, l. 1 through p. 1128.7, l. 7 (R. p. 1092, line 1-p. 1093, line 7); Hearing Ex. 35 (R. p. 1210).

In its March 25th Directive, the Commission provided the following rationale for its decision to exclude any recovery for the ALC Proceeding expenses:

> I move that the Commission remove and deny recovery of the Administrative Law Court legal expenses for the DHEC Permit Denial ($43,355) and I-20 Interconnection ($13,190) on the grounds that the Company should have sought recovery of legal expenses related to the condemnation proceedings as provided by law to the prevailing party. This amounts to remove from proforma adjustments total $56,545.

March 25 Directive, (R. p. 429). The Commission's final order in the case, Order No. 2020-306, did not address this issue.

[13] At page 85 of Order No. 2020-306 the Commission appears to accept ORS's Adjustment 9(c) in which ORS accepted and supported amortization of the expenses from the ALC Proceedings. However, based on the ruling in the March 25th Directive and the figures in Exhibit 1 to Order 2020-306, the Commission excluded recovery of the ALC Proceedings. In its Petition for Reconsideration and Clarification (R. p. 751), Blue Granite requested clarification of this issue but the issue was not addressed in the Order on Rehearing, Order No. 2020-641 (R. p. 393).

No party to this proceeding presented any evidence to support the Commission's apparent conclusion that Blue Granite could have recovered its expenses from the ALC Proceedings in the separate I-20 condemnation proceedings. No witness offered any such testimony, and no party supported this view on rehearing. Blue Granite had no opportunity to present evidence that "it should have sought recovery of legal expenses in the condemnation proceedings…", and the decision therefore violates the Company's due process rights because the Company was not on notice as to this treatment and has had no opportunity to be heard or introduce evidence related to it. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

The Commission's decision to disallow any recovery of legal expenses from the ALC proceedings is flawed in the same way as its decision regarding recovery of prior legal expenses discussed in the above section. The decision on the ALC Proceedings' expenses is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. There is no evidence in the record to support it. In addition, the decision fails again to comply with the Supreme Court's guidance in the *Utilities Services* case that it is error of law to refuse to allow a utility a meaningful opportunity to respond to the evidence presented in opposition to its proposed rates. *Utils. Serv. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011) (finding that it was error of law for the Commission to fail to give a utility "a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates").

In addition to these clear errors of law, the Commission apparently failed to review or consider the provisions of the South Carolina Eminent Domain Act, S.C. Code Ann. §§ 28-2-10 *et seq*. which defines potentially recoverable "litigation expenses" as legal expenses incurred **in the condemnation proceeding** and which would not allow recovery of legal expenses in related

but separate administrative proceedings, as the legal expenses at issue here. Specifically, the S.C. Eminent Domain Act defines litigation expenses as those "necessary for preparation or participation in condemnation actions and the actual cost of transporting the court and jury to view the premises"—S.C. Code Ann. § 28-2-30(14)—and prescribes that such condemnation actions take place in South Carolina circuit court. The ALC Proceedings, which addressed the DHEC permit denial and I-20 interconnection issues, have no connection to the S.C. Eminent Domain Act and the associated expenses could not have been recovered under that law.

Inasmuch as the Commission's decision was "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards," such decision is arbitrary and capricious. *Deese*, 286 S.C. at 184, 332 S.E.2d at 541. The Commission's treatment of the ALC Proceedings' legal expenses is without evidentiary support and based on fundamental errors of law. Accordingly, the Commission's disallowance of these expenses should be reversed.

V. The Commission's acceptance of an adjustment disallowing the Company's recovery of storm costs constitutes error and should be reversed.

The Commission's rejection of the Company's storm costs and its imposition of ORS's proposed 10-year storm cost normalization is yet another example of unsupported Commission decision-making intended to punish the Company. As explained below, the Commission's decision to apply a 10-year normalization is contrary to the evidence in the record and is scantly supported in the Commission's order by only the following "reasoning": "There is disagreement between the parties regarding this adjustment. The Commission finds that this adjustment is just and reasonable and adopts the same." Order No. 2020-306, p. 86 (R. p. 327). Such poor and unsupported decision-making is arbitrary and capricious; not supported by the reliable, probative,

and substantial evidence in the whole record; is characterized by an abuse of discretion or a clearly unwarranted exercise of discretion; and amounts to an unconstitutional taking as it is merely confiscatory. Further, it fails to meet the requirements set forth by this Court in *Porter v. S.C. Pub. Serv. Comm'n*:

> An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Where material facts are in dispute, the administrative body must make specific, express findings of fact. . . . [A] recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues. We find the order in this case deficient because PSC made no findings of fact or offered any explanation of its conclusion.

Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998); *see also Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999).

In ratemaking, the purpose of using a test year and making adjustments "is to permit sufficient and accurate cost recovery as the expenses are incurred by the utility in real-time. In other words, the purpose of this ratemaking exercise of using a test year and making appropriate adjustments is to match—as closely as possible—the utility's revenue to the costs it will incur after the rates are implemented." Order No. 2019-323, Docket No. 2018-319-E at 15-16 (May 21, 2019) (citing *Southern Bell Tel. & Tel. Co. v. S.C. Pub. Serv. Comm'n*, 270 S.C. 590, 602 (1978)). The purpose of normalization within this paradigm is to represent normal conditions to be anticipated in the future once rates are implemented. *See* Order No. 2002-761, Docket No. 2002-63-G (Nov. 1, 2002); *see also Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984) ("The object of test year figures is to reflect typical conditions. Where an unusual situation exists showing that the test year amounts are atypical, the Commission should adjust the test year data.").

Certainly, neither the Commission nor any other entity can predict what level of storm costs the Company will experience over the next year or two. But the Commission's decision-making must be supported by evidence, and it must have a rational basis. The Commission's decision-making cannot be "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f). A decision is deemed arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese*, 286 S.C. at 184, 332 S.E.2d at 541; *Daufuskie*, 427 S.C. at 464, 832 S.E.2d at 575. In this case, the Commission's reasoning consisted solely of its finding that "there is disagreement" about this issue and that ORS's proposed normalization level was "just and reasonable." Order No. 2020-306, p. 86 (R. p. 327). This is precisely the unreasoned, arbitrary decision-making warned about in *Porter*, *Deese*, and *Daufuskie*.

The Commission's decision to effectively slash in half the Company's actual test year storm recovery expenses of $51,802 to the 10-year level of $28,320 is not supported by the reliable, probative, and substantial evidence in the record. ORS witness Bickley stated, without supporting, that a 10-year normalization figure of $28,320 "more accurately reflects the expected storm costs for each year." Tr. p. 1186, ll. 24-25 (R. p. 1101, lines 24-25). Such opinion testimony is of no probative value because it is not accompanied by an underlying showing of the evidentiary basis on which it relies. *Parker v. South Carolina Public Service Comm'n*, 281 S.C. 215, 217, 314 S.E.2d 597, 599 (1984) (citing *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 678 (1978)). Further, despite such claimed "accuracy," Mr. Bickley admitted on cross-examination that ORS's proposed 10-year normalization figure of $28,320 would not cover any one of the Company's most recent five years of storm costs. Tr. p. 1244, l. 22 (R. p. 1128, line 22). For that

reason, it could hardly be said to represent the Company's recent experience or its anticipated level of expenses once rates are implemented. The evidence in the record demonstrates that the Company experienced a minimum of $32,607 in annual storm costs over the past five years, a 5-year average of $42,493, and a test year level of storm costs of $51,802. Tr. p. 764.22, ll. 2-4 (R. p. 1058, lines 2-4). A normalization figure, therefore, of $28,320 has no connection to the recent level of storm costs experienced by the Company.

Consistent with the Commission's *modus operandi* in this proceeding, the 10-year storm cost level of $28,320 was chosen by the Commission simply because it was the lowest offer on the table, not because it was the result of reasoned decision-making. Per the Commission's recent Order No. 2019-323, referenced above, and *Southern Bell Tel.*, 270 S.C. at 602, 244 S.E.2d at 284, the purpose of using a test year and making adjustments is to accurately reflect the Company's ongoing costs, thereby permitting accurate and sufficient cost recovery. The evidence in the record demonstrates that the Company has not experienced storm recovery costs as low as that set by the Commission since 2014, that the Company's storm recovery costs since that time have been consistently higher than the level set by the Commission, and that the storm recovery costs actually experienced in the test year were nearly twice that set by the Commission. Tr. p. 764.22, ll. 2-4 (R. p. 1058, lines 2-4). The Commission setting rates at such a low level, particularly without any explanation or rationale justifying its decision-making, is punitive and constitutes an abuse of the Commission's discretion. Further, because the storm cost level is below the Company's actual experienced storm recovery cost levels and is therefore confiscatory, the level set by the Commission represents an unconstitutional taking. *Duquesne Light Company v. Barasch*, 488 U.S. 299, 307 (1989).

VI. The Commission's disallowance of the Company's office rent expense and upfit costs is clearly erroneous given the substantial evidence in the record, as well as an arbitrary and capricious usurpation of the legitimate management decision-making of the Company.

In the Order, the Commission disallowed recovery of the Company's ongoing rent expense of its relocated headquarters office, as well as the upfit costs of the relocated office, which consisted of costs associated with tasks such as putting up drywall, installing electrical and telecommunications lines, and painting. The Commission's Order is clearly erroneous as it ignores both substantial evidence of record and the presumption that a utility's expenses are made in good faith and are reasonable. The Order also ignored substantial evidence regarding the Company's reasonable decision as to where to locate its office, and usurps the utility's business management decision-making authority through rate regulation.

First, the Commission completely disallowed the Company's rent expense for its headquarters office, effectively meaning that the Commission expects the Company to operate without a building, concluding, without supporting, that such disallowance was "just and reasonable." Order No. 2020-306 at p. 58. (R. p. 299). The record shows that the costs associated with the former headquarters office—located in an industrial park in West Columbia, and sold in 2018—had been removed from rate base in Blue Granite's last rate case, and were not included in rate base in this case either. Tr. p. 355.4, ll. 7-8 (R. p. 875, lines 7-8); Tr. p. 1151, ll. 5-25 (R. p. 1100, lines 5-25). Consequently, without this rent expense, there is no allowance in rates whatsoever for Blue Granite's headquarters office. While the accounting system adopted by the Commission, the Uniform System of Accounts, dictates that leased utility property be included above-the-line in rates, the Commission inexplicably deviated from this accounting system. *See* S.C. Code Ann. Regs. 103-517, 103-719 (adopting the Uniform System of Accounts for water and wastewater utilities); 18 C.F.R. § 101.1(A) ("This account shall include the amount recorded under

capital leases for plant leased from others and used by the utility in its utility operations."). As explained by the Company in testimony, "[a] functional headquarters office space is necessary for our employees to provide utility service, and the associated costs should be reflected in rates." Tr. p. 352, ll. 22-24 (R. p. 873, lines 22-24).

The Commission's Order is arbitrary and capricious because it ignores the utility's presumption of reasonableness and is based on no evidence. The former industrial park location, in addition to "legacy brand issues," made it difficult for the Company to attract and retain high quality employees. Tr. p. 355.4, ll. 7-9 (R. p. 875, lines 7-9). For that reason, the Company made the reasonable management decision to move its headquarters to another location. Per evidence offered by the Company, the new location of Greenville better matched the Company's "long-term goals of attracting and retaining talented employees and growth throughout the state." Tr. p. 355.6, ll. 11-13 (R. p. 877, lines 11-13). The evidence also showed that, based on CBRE data, the labor supply and affordability of Greenville versus Columbia or West Columbia was more reasonable. Tr. p. 355.6, ll. 13-16 (R. p. 877, lines 13-16).

There is no evidence in the record suggesting that the decision to move was imprudent. In other words, there is no evidence in the record overcoming the Company's presumption of reasonableness as related to its decision to relocate from the West Columbia industrial park to another location. *See Hamm*, 309 S.C. at 286, 422 S.E.2d at 112 (concluding that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith); *Utils. Servs. of S.C.*, 392 S.C. at 110, 708 S.E.2d at 762-63 (concluding that the presumption of reasonableness may be overcome if sufficient evidence is proffered, after which the utility must further substantiate its claimed expenditures). Once the management decision to move to Greenville was made, there were necessarily going to be costs incurred associated with renting office space and upfitting the office regardless of the location of the new office.

The Commission also completely disallowed the Company's office upfit costs even though the evidence demonstrates that such upfit costs were reasonable. Company witness Denton is a former licensed general contractor in the state of North Carolina and offered testimony that the upfit costs were "fairly reasonable" and "below market for a lot of these local markets in the Carolinas." Tr. p. 384, l. 23 through p. 385, l. 4 (R. p. 888, line 23-p. 889, line 4). The Company also relied upon a cost benchmarking guide from real estate firm JLL that indicated the Company's upfit costs (drywall, electrical lines, furniture, etc.) were more than 20% less than the lowest-cost domestic city listed in that report. Tr. p. 355.5, ll. 11-13 (R. p. 876, lines 11-13). The Company also offered evidence that the per-employee square footage size of the new office was substantially less than its former headquarters location. Tr. p. 355.5, ll. 14-18 (R. p. 876, lines 14-18). ORS witness Maurer—a water systems engineer with no experience in building construction, Tr. p. 1261, l. 25 through p. 1262, l. 2 (R. p. 1130, line 25-p. 1131, line 2)—offered testimony that, in his opinion, the office upfit costs were not reasonable. Such opinion testimony, however, without an underlying showing of the evidentiary basis on which it relies, is of no probative value. *Parker v. S.C. Pub. Serv. Comm'n*, 281 S.C. 215, 217, 314 S.E.2d 597, 599 (1984). Additionally, while the Company offered evidence indicating that its expenditures were actually below-market, ORS offered no evidence whatsoever as to what amount of upfit costs actually would have been reasonable. "The PSC must not deny an application in its entirety when only a small portion of the expenditures claimed by the utility have been called into question." *Utils. Serv. of S.C. Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 115, 708 S.E.2d 755, 765 (2011). While witness Maurer repeatedly used the word "upgrade" when referring to the office upfits in his testimony, he confessed during the hearing that he did not consider the actual upfit costs for drywall, carpeting and the like to be upgrades—a line of questioning that was curtailed by Commissioner Ervin. Tr. p. 1262, l. 9 through Tr. 1263, l. 3 (R. p. 1131, line 9-p. 1132, line 3).

Never mind any dispute over the *amount* of costs of rent or the *amount* of costs of the upfit—which the Company asserts are eminently reasonable—the Commission disallowed recovery of all of these costs. The Commission erroneously found that the move to the new office was "necessitated by legacy brand problems the Company created" and that the Company had "previously represented to this Commission and its customers that the refreshing of its brand would be at no cost to customers." Order No. 2020-306 at 97 (R. p. 338). As explained above, the Company was having difficulty attracting and retaining employees due to both its former industrial park location and its brand issues in the West Columbia area. Seeking to improve the utility's staff and attract high quality personnel—which will, in turn, enable the Company to provide better service to its customers—the Company made the prudent management decision to move its office out of the West Columbia industrial park. The Commission's decision disallowing all of its headquarters rent expense and costs necessary to make the building "ready to work" is facially unreasonable and a wanton and unwarranted exercise of discretion.

The Commission erroneously contorted the Company's previous representations regarding its name change and rebranding. In a prior proceeding, Commission Docket No. 2018-365-WS, the Company sought approval to change its name, and represented in that proceeding that the name change would have no impact on the Company's rates. That representation remains accurate. The costs associated with the name change, such as new logo design, signage, uniforms, and truck decals, were excluded from the Company's revenue requirements. The business decision to relocate the Company's headquarters office is a separate and distinct matter related to employee recruitment and retention, not a change in the Company's name. The Commission has previously found that it "has no authority to manage the utility," or to make managerial decisions on behalf of the Company, but it now has determined that the utility cannot recoup its costs for its prudent managerial decision to relocate its headquarters. Order No. 2005-42 at 31, Docket No. 2004-212-

S (Feb. 2, 2005) ("While this Commission's decisions are often based on the prudence or imprudence of management decisions, those decisions involve a review of the management decisions, and this Commission has no authority to manage the utility."); Order No. 2019-323 at 56, Docket No. 2018-319-E (May 21, 2019) ("No party has alleged that the 'rank and file' employees are overpaid, and how the Company decided to compensate its employees is a managerial decision, which is the sole responsibility of the Company. How to pay employees is a managerial decision, and as long as the costs and results are reasonable this Commission has no basis to reject the compensation at issue."). The Commission's decision to disallow recovery of the utility's prudently incurred expenses is an arbitrary, capricious, and unreasoned departure from its prior findings that it has no authority to control the utility's business judgment and managerial decision-making.

Finally, the Commission failed to provide a rationale for its erroneous disallowance of the office rent expense. First, the record shows that the costs associated with the prior West Columbia headquarters office (sold in 2018) had been removed from rate base in Blue Granite's last rate case and were not included in rate base in this case. Tr. p. 1151, ll. 8-13 (R. p. 1100, lines 8-13). Consequently, without rent expense or the upfit costs, there is no allowance in rates for the Company's headquarters. Second, there is no evidence that this rent expense was either unreasonable or imprudent. In fact, once a decision to relocate the office was made, for valid management reasons, both upfit and rent expenses were going to be incurred, regardless of the ultimate location of the relocated office. Lastly, the record reflects that this rent expense was actually incurred, and the utility is entitled to a presumption that its expenses are reasonable and incurred in good faith. The Commission's Order is arbitrary and capricious because it ignores these presumptions, is based on a lack of evidence, and fails to properly document its conclusion.

The decision of where to relocate a company's headquarters is uniquely a utility management decision rather than a decision for the Commission. The Order's disallowance is both clearly erroneous considering the substantial evidence in the record, as well as arbitrary and capricious. This Court should remand with instructions to the Commission to approve rates allowing the recovery of all the Greenville office uplift and rent expenses.

VII. The Commission erred in disallowing the Company's recovery of non-revenue water of greater than 10%.

The Commission's decision to disallow Blue Granite's recovery of non-revenue water of greater than 10% is characterized by an abuse of discretion or a clearly unwarranted exercise of discretion, and no evidence was proffered that overcame the presumption of the reasonableness of the Company's water expenses, particularly as compared to the investment required to mitigate non-revenue water. In any water system, there is some amount of water that is unaccounted for and that remains unbilled to a specific customer between its point of entry into the system and the amount of aggregate, billed customer water usage; this unbilled water is referred to as "non-revenue water." In this case, the Commission disallowed expenses associated with non-revenue water above a 10% threshold.

As relied upon by ORS in the underlying proceeding, it was previously the case that the American Water Works Association (the "AWWA") used 10% as a benchmark for non-revenue water. Tr. p. 1201.5, ll. 12-13 (R. p. 1107, lines 12-13). More recently, however, "AWWA recommends that water utilities, regulatory agencies and other industry stakeholders discontinue use of a [Volumetric Percentage Performance Indicator] or "unaccounted-for" water percentage indicator." Tr. p. 363.4, ll. 1-3 (R. p. 881, lines 1-3). The AWWA now finds that a percentage threshold "arguably has never been successful in motivating sustained, measurable loss reductions," and that "[t]hresholds for compliance should be based on well-founded rationales that

yield actionable information and recognize benefit-cost analysis." Tr. p. 363.4, ll. 9-23 (R. p. 881, lines 9-23). For these reasons—in particular the finding by the AWWA that application of a universal threshold is arbitrary and should be substituted by a more rational approach—the Company proposed during the proceeding that, rather than apply an arbitrary 10% level of recovery, the Commission should compare the costs of non-revenue water to the costs of remediation on a system-by-system basis. Tr. p. 363.8, ll. 1-4 (R. p. 885, lines 1-4). There are costs associated with leak detection itself, and additional costs to perform repairs and replacements once leaks have been detected. Tr. p. 363.7, ll. 9-13 (R. p. 884, lines 9-13). In its rebuttal testimony to testimony pre-filed by ORS, the Company showed that the costs for leak detection alone (i.e., without the added cost of subsequent necessary repairs and replacements) would, for 12 of the Company's 16 non-well systems, be greater than the cost of the non-revenue water, and provided evidence supporting this position. Tr. 363.7, l. 20 (Table 1) (R. p. 884, line 20). For the four systems for which it would be economic for customers, the Company proposed that recovery for non-revenue water be disallowed and that the Company begin to conduct leak testing and associated repairs and remediation. Company Proposed Order, p. 46 (R. p. 662).

Such an approach—detecting and repairing leaks on problematic systems and disallowing recovery of excessive non-revenue water on those systems—strikes a rational and reasonable balance between incentivizing the utility to invest in its system while not requiring customers to bear improvement costs on systems where it is not economical. Instead of this rational, reasonable and balanced approach proposed by the Company, the Commission found that a disallowance based on an across-the-board threshold of 10% would somehow protect customers. It does not. Instead, the Commission's determination forces the Company to either (1) accept the penalty of the disallowance or (2) to make imprudent, uneconomic investments that will actually drive up costs for its customers once the investments are reflected in rates. Because the Commission's

decision purports to protect customers from the costs of non-revenue water above 10%, while requiring the Company to make an investment that will increase costs above the cost of the water loss, the dilemma created by the Commission's unreasoned decision-making is the product of an abuse of discretion or a clearly unwarranted exercise of discretion.

No evidence was proffered by another party that overcame the presumption of the reasonableness of the Company's water expenses, particularly as compared to the investment required to mitigate non-revenue water. The Commission's rationale for using the 10% threshold was limited to the following: (1) "[T]he Commission finds that Blue Granite failed to rebut ORS witness Maurer's testimony that the Company regarding the adjustments [sic] for purchased water deferral account and the ten percent (10%) threshold limitation," and (2) "[the Commission] therefore finds ORS's adjustment just and reasonable to limit the customer's responsibility for non-revenue water expenses to 10% in each subdivision for Blue Granite Service Territories 1 and 2 . . . ." Order No. 2020-306 at 83 (R. p. 324).

As for the Commission's first finding, in response to witness Maurer's testimony—which was not supported by underlying evidence or data—the Company proffered evidence demonstrating that the cost of leak detection and remediation for a majority of the Company's systems would cost more than the non-revenue water, a fact about which no party presented contrary evidence. While ORS witness Maurer opined generally that non-revenue water above 10% should be disallowed, "opinion testimony, without an underlying showing of the evidentiary basis on which it relies, is of no probative value." *Parker v. S.C. Pub. Serv. Comm'n*, 281 S.C. 215, 217, 314 S.E.2d 597, 599 (1984). Indeed, no party proffered any evidence that raised the specter of imprudence as related to non-revenue water, and the Company proffered abundant evidence demonstrating conclusively that the costs of remediation for a majority of its systems would, in fact, cost customers more than the costs associated with non-revenue water. *See Utilities*

Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109-10, 708 S.E.2d 755, 762-63 (2011) (finding that a utility's expenses are presumed to be reasonable and incurred in good faith unless and until a party produces evidence that demonstrates a tenable basis for raising the specter of imprudence, after which the utility has an opportunity to proffer evidence that further substantiates its position). For these reasons, the Commission's decision-making constitutes an abuse of discretion or a clearly unwarranted exercise of discretion.

The Commission's second finding is that (a) limiting recovery from customers to no more than 10% of non-revenue water expenses will (b) limit customers' responsibility to no more than 10% of non-revenue water expenses. Such a finding is tautological, circular, and without a rational basis. For that reason, this finding is arbitrary or capricious, and is characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Without a well-reasoned finding that the costs of leak detection and remediation are justified by the amount of non-revenue water costs, the Commission's determination is facially arbitrary and capricious and represents an abuse of discretion.

VIII. The Commission's stay of the Company's implementation of rates under bond is unlawful, is the product of arbitrary and capricious decision-making, and violated the Company's substantive due process rights.

The Company appeals the Commission's stay of the implementation of rates under bond during the pendency of its appeal. The purpose of putting rates into effect under bond is to establish the necessary balance between protecting the customer's right to fair and reasonable rates and protecting the utility's need to receive revenues that support its operations and investment. The U.S. District Court in South Carolina and the U.S. Supreme Court have weighed in on these issues. In *United Gas Pipeline Co. v, Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) (*United Gas Pipeline*), the U.S. Supreme Court found the following as related to the utility's implementation of rates under bond under a similar federal statute:

> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interest of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible.

358 U.S. 103, 113. In *Holt v. Yonce, Chairman of the S.C. Public Service Commission*, 370 F.Supp. 374 (D. S.C. 1973), affirmed by the U.S. Supreme Court at 94 S.Ct. 1553 (1974), the Court was likewise faced with a challenge to the statutory allowance of permitting utilities to put rates into effect under bond, in that case involving South Carolina Electric & Gas. The Court relied upon *United Gas Pipeline*, finding that, while rate increases may be difficult for certain customers, such increases "make possible expanded utility service to all who need it." 370 F.Supp. 374, 379. The Court in that case rejected the plaintiffs' challenge.

a. The Commission's stay of the Company's implementation of rates under bond is *ultra vires*.

The Commission lacks the requisite authority to stay the implementation of the Company's rates under bond, and such a stay is therefore an *ultra vires* act. The Court has previously concluded the following concerning the limits on administrative agencies' authority:

> It is elementary law that administrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Such (administrative) bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.

Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 411, 140 S.E.2d 774, 776 (1965) (internal citations omitted). As creatures of statutes, regulatory bodies "have only the authority granted

them by the legislature." *Responsible Economic Development v. South Carolina Dep't of Envir. Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007). For that reason, any action taken by the agency "outside of its statutory and regulatory authority is null and void." *Id.*; *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) (citing 73A C.J.S. Public Administrative Law and Procedure, § 117 (1983)). Administrative agencies

> must follow statutory established standards and not their ideas of what would be charitable or equitable, and may not ignore or transgress the statutory limitations on their power, even to accomplish what they may deem to be laudable ends, such as service of the public interest. Agency actions beyond delegated authority are ultra vires and should be invalidated. Stated another way, an agency that exceeds the scope of its statutory authority acts ultra vires and the act is void.

73 C.J.S. Public Administrative Law and Procedure § 163 (2020). The Commission's stay of the Company's implementation of rates under bond is *ultra vires*. The narrow ambit of the Commission's authority granted by the Bond Provision is to consider and approve the reasonableness of the amount of the bond and the adequacy of the surety:

> If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission . . . .

S.C. Code Ann. § 58-5-240(D). "The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Hitachi Data Systems Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The plain language of the statute in this case expressly authorizes ("the utility may") the Company to put rates into effect under bond while the Commission's decision is under appeal and "until final disposition of the

case," and there is no companion statutory provision that would permit the Commission to override this statutory authorization.

The Consumer Advocate appears to suggest in its reply to the Company's Petition for Writ of Supersedeas that S.C. Code Ann. § 58-5-240(D) carries sufficient ambiguity to permit the Commission to stay the implementation of rates under bond. While the Company challenges that view, even assuming *arguendo* that the language of the statute were ambiguous, the Commission's consistent, repeated conclusions that it does not have discretion militates against a finding that the Commission has discretion to stay the implementation of rates under bond. "A consistent mode of applying a statute by the responsible governing agency has been given considerable judicial deference in the construction of ambiguous statutes." *C v. Cobb*, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979) (citing *Weeks v. Friday*, 255 S.C. 447, 452 (1971); *see also Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("In construing an ambiguous statute, we give great deference to the government agency's consistent application of the statute."). Indeed, the lack of ambiguity in the statute supports the Commission's previous, repeated conclusions that it has no discretion as related to a utility's implementation of rates under bond.

The Commission has never found that it has authority to stay a utility's implementation of rates under bond. To the contrary, the Commission has consistently found that S.C. Code Ann. § 58-5-240(D) permits a utility to implement rates under bond once it has filed a petition for rehearing as a matter of right. *See* Exhibit J to the Company's Petition for Writ of Supersedeas (Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016)). The Commission found the same in the instant case, providing approval of the Company's bond amount and surety through unanimous vote on July 15, 2020, and finding that "[t]he Commission has no discretion other than to approve the amount of bond and the

sureties." Exhibit C to the Petition for Writ of Supersedeas (July 15, 2020 Directive, Docket No. 2019-290-WS) (R. p. 437). Further, the Commission recently found that it "has not been authorized by statute to grant injunctive relief." *See* Exhibit L to the Company's Petition for Writ of Supersedeas (Order No. 2019-521, Docket No. 2019-204-E (July 17, 2019)). The Administrative Procedures Act provides that, even for state agencies that actually are "authorized by law to seek injunctive relief," such must be done through the Administrative Law Court rather than under their own auspices. S.C. Code Ann. § 1-23-600(F) ("[A] state agency *authorized by law to seek injunctive relief* may apply to the Administrative Law Court for injunctive or equitable relief . . . .") (emphasis added). Nevertheless, the Commission now finds that it can wield such injunctive power to deprive the Company of a right granted by statute.

While the statute at issue provides that "there may be substituted **for the bond** other arrangements satisfactory to the Commission for the protection of parties interested," such does not confer upon the Commission the authority to stay a utility's right to implement rates under bond. S.C. Code Ann. § 58-5-240(D) (emphasis added). The substitution authorized by the statute, by its plain language, is "for the bond," not for the utility's statutorily authorized option to implement rates that are secured by a bond or by some other substitute arrangement. *See Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 543, 426 S.E.2d 319, 322 (1992) ("In interpreting a statute, it is imperative that the statute be accorded its clear meaning."). Previous arrangements alternative to a bond have included letters of credit and letters of undertaking while the utility implemented new rates. *See* Exhibit K to the Company's Petition for Writ of Supersedeas (Order No. 1982-491, Docket No. 1982-247-W (July 14, 1982); Order No. 1981-176, Docket No. 1981-84-S (Mar. 18, 1981); Order No. 1982-218, Docket No. 1982-111-W (Mar. 31, 1982); Order No.

1980-352, Docket No. 1980-162-WS (June 13, 1980)). Such types of guarantees[14]—bonds, letters of credit, and letters of undertaking—protect customers by providing a reserve of funds should rates later be reduced and protect the utility by permitting new rates to go into effect.

While the Company was permitted by the Commission to track the lost revenues in a regulatory asset account, this is merely an accounting mechanism. Unlike implementing higher rates under bond, regulatory accounting provides no certainty of recovery and is therefore not a "substitute" as contemplated and required by S.C. Code Ann. § 58-5-240(D), much less is it a substitute "for the bond" as required by the statute. Further, even assuming *arguendo* that the statute permitted alternative arrangements to implementing rates on appeal as protected by a guarantee—which it does not—contrary to the requirements of the statute, regulatory accounting treatment does not offer sufficient "protection of parties interested." "Administrative discretion can be exercised *only . . . in accordance with the standards prescribed by statute or ordinance*." *Atlantic Coast Line R. Co. v. S.C. Pub. Serv. Comm'n*, 245 S.C. 229, 235, 139 S.E.2d 911, 914 (1965), *overruled on other grounds by Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998) (emphasis added) (citing *Hodge v. Pollock*, 223 S.C. 342 (1953)). While the Commission has the authority to approve the implementation of a substitute <u>for the bond</u> under the Bond Provision, such does not go so far as to empower the Commission to stay the implementation of rates under bond.

[14] "Guarantee" is defined as "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent." Guarantee, Black's Law Dictionary (11th ed. 2019).

b. The Commission's stay on the implementation of rates under bond constitutes arbitrary and capricious decision-making and violates the Company's substantive due process rights by depriving the Company of a property interest granted by state law.

As with many of the Commission's decisions in this case, the Commission's stay constitutes arbitrary and capricious decision-making. An agency's decision is deemed arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (S.C. Ct. App. 1985). Never before has the Commission determined that it has discretion or flexibility as related to a utility's right to implement rates under bond. As noted, the Commission has repeatedly found that it, in fact, "is without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond," and that utilities may implement rates under bond "as a matter of right." *See* Exhibit J to the Company's Petition for Writ of Supersedeas (Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016)).

Further, despite its broad finding in the August 31, 2020 directive that the pandemic is causing "troubling effects" for South Carolina utility customers, the Commission's actions have been directed against Blue Granite alone. On August 20, 2020, for example, the Commission issued Order No. 2020-561, authorizing a significant rate increase for Palmetto Utilities, Inc. to begin on September 20, 2020. Further, although the Commission's very recent actions have been against Blue Granite alone, as far back as May 14, 2020—in Docket No. 2020-106-A, a generic docket applicable to all South Carolina regulated utilities—while thanking the state's utilities "for their work and actions during the COVID-19 State of Emergency," the Commission rescinded the

broad-based customer protections it had implemented in March 2020. Order No. 2020-374, Docket No. 2020-106-A (May 14, 2020). Now, nearly four months later, the Commission finds that due to the "troubling effects of the COVID-19 pandemic,"[15] Blue Granite's customers should be spared from the rates under bond to which the utility is statutorily entitled. In summary, the Commission overturned more than a decade of its own precedent finding that it had no discretion as related to rates under bond, approved another similarly situated utility's rate increase, and rescinded the broad customer protections it had implemented in March 2020, but will not permit Blue Granite to implement rates under bond. This conduct is patently arbitrary and capricious.

The Company holds a substantive due process right to implement rates under bond, and the Commission's action to stay the utility's implementation of rates under bond arbitrarily and capriciously deprives the Company of this right. This Court has previously provided guidance on this issue:

> [T]o prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Thus, parties claiming such violations must first show they have a legitimate property interest.
>
> Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. To determine if the expectation of entitlement is sufficient will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the agency.

Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012) (emphasis added) (internal citations omitted). The bond statute permits utilities to implement higher rates under bond, and therefore creates a property interest for utilities in those increased revenues, i.e., a law "that secure[s] certain benefits and that support[s] claims of entitlement to

[15] Aug. 31, 2020 Directive, Docket No. 2019-290-WS.

those benefits." Further, the discretion of the Commission is restricted to approving the amount of the bond and the surety (which it has done in this case), and the Commission has unwaveringly found that the bond statute grants utilities the authority to implement rates under bond "as a matter of right."

IX. The Commission's treatment of the Company in this case falls below the appropriate standard.

In the Company's view, the Commission's actions in this case fall well short of complying with this Court's recent directive that the Commission "carry out [its] important responsibilities consistently, within the objective and measurable framework the law provides." *Daufuskie*, 427 S.C. at 464, 832 S.E.2d at 575 (citing *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 113 (2011)). Without supporting evidence or recognition of governing legal principles, the Commission slashed the Company's proposed rates to a confiscatory level. Once the Commission had erroneously disallowed recovery of a substantial portion of the Company's prudently incurred expenses, it unlawfully stayed the Company from implementing rates under bond—the one protection utilities have when the Commission sets rates at an unlawfully low level. On the same day the Company filed its request for rehearing of the Commission's stay, the Commission re-posted from its official Twitter account the Consumer Advocate's "victory tweet," lauding the Commission's decision to stay the Company's implementation of rates under bond "which would have added strain to consumers' wallets in the midst of the #COVID19 crisis," and linking to the Consumer Advocate's press release discussing the proceeding in more detail. Exhibit G to the Company's Petition for Writ of Supersedeas. The Consumer Advocate is an intervenor and has been an active participant in the proceeding before the Commission,[16] and the

[16] S.C. Code Ann. § 37-6-604(C), added to the Code by Act No. 258 of 2018, permits the Consumer Advocate to intervene in proceedings before the Commission. On November 25, 2019, the Consumer Advocate filed a petition to intervene, which was granted by the Commission on

Company questions the propriety of the Commission retweeting a party's "victory tweet" while the proceeding still jurisdictionally belongs to the Commission, and when the substance of the communication is the very issue about which the utility is seeking redress. The consistent actions of the Commission in this case show a disregard for the evidence of the case and an indifference to the objective framework of the law.

CONCLUSION

Blue Granite requests that this Court order the following relief based on the errors and unlawful actions described in this brief:

i. Reverse the Commission's inappropriate "amortization" of the Company's ongoing Purchased Service Expenses and remand this issue to the Commission with instruction to reflect the full amount of the Company's ongoing Purchased Service Expenses in its annual revenue requirement and associated rates;

ii. Reverse the Commission's unsupported ROE and remand this issue to the Commission with instruction to establish the Company's ROE at a level supported by the evidence in the record and that meets the applicable legal requirements, and to recalculate the annual revenue requirement consistent with an ROE supported by the record;

iii. Reverse the Commission's unsupported disallowance of legal expenses from prior Commission proceedings and Administrative Law Court proceedings, and remand these issues to the Commission with instruction to reflect these legal expenses in the Company's annual revenue requirement and associated rates;

iv. Reverse the Commission's unsupported disallowance of storm recovery expenses, and remand this issue to the Commission with instruction to reflect the Company's actual test year storm expenses in its annual revenue requirement and associated rates;

v. Reverse the Commission's erroneous disallowance of the Company's headquarters office rent expense and upfit costs, and remand this issue to the Commission with instruction to reflect these costs in the Company's annual revenue requirement and associated rates;

December 10, 2019 by Order No. 2019-849.

vi. Reverse the Commission's arbitrary disallowance of non-revenue water expenses, and remand this issue to the Commission with instruction to reflect these expenses in the Company's annual revenue requirement and associated rates; and

vii. Reverse the Commission's unlawful stay of the Company's implementation of rates under bond until final disposition of this case as provided for by South Carolina law.

As in *United Gas*, the role of the Commission is not only to protect customers from excessive prices for water and wastewater services, but also to ensure that utilities in South Carolina are viable as going concerns and have the necessary incentive, consistent with applicable law, to continue investing in the state's infrastructure. Absent the Commission's diligent execution of its duties, utility customers and utility providers will suffer.

Respectfully submitted,

s/Samuel J. Wellborn
Frank R. Ellerbe, III, Esquire
Samuel J. Wellborn, Esquire
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
803.929.1400

Attorneys for Appellant

Columbia, South Carolina
February 15, 2021